FILED
DEC 12 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-863

MICHAEL LEO FIORELLA, A. RICHARD FIORELLA, CLIFFORD CARLL, JOHN PORCELLO, ANTHONY PIZZUTELLI, ANGELO ALFANO, ALFRED RIVOLI, JAMES COMUNALE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 1972.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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MICHAEL LEO FIORELLA, A. RICHARD FIORELLA, CLIFFORD CARLL, JOHN PORCELLO, ANTHONY PIZZUTELLI, ANGELO ALFANO, ALFRED RIVOLI, JAMES COMUNALE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Michael Leo Fiorella, A. Richard Fiorella, Clifford Carll, John Porcello, Anthony Pizzutelli, Angelo Alfano, Alfred Rivoli and James Comunale, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 13, 1972.

Opinions Below

The opinion of the Court of Appeals dated October 13, 1972, is not yet reported. It is reprinted in the Appendix at page A-1, *infra*. The District Court for the Western District of New York did not write an opinion.

Jurisdiction

Following a jury trial, the petitioners were foun
of conspiring to violate § 1955 of Title 18, the new
gambling statute making it a crime for five or more
to conduct an illegal gambling business. Each of
tioners was found not guilty of the substantive o
violating § 1955 of Title 18.

On April 4, 1972 each of the petitioners receive
year suspended sentence and was placed on prob
two years. The petitioners were also fined in
amounts.*

On October 13, 1972 the Court of Appeals for th
Circuit affirmed the petitioners' judgments of c
This petition for a writ of certiorari is filed in tim
ion, an extension of time having been granted
Justice Marshall by an order dated October 25, 1

The jurisdiction of this Court is invoked under 2
§ 1254(1).

Questions Presented

1. Whether the failure of the Attorney Gene
specially designated Assistant Attorney General t
ly authorize the application for the wiretap or
idated the order and made the conversations sei
it inadmissible.

2. Whether the wiretap order was invalid
failed to particularly describe the type of comm
sought to be monitored and to identify the pers
conversations were to be intercepted.

---

* The fines imposed on the petitioners were as follo
Fiorella, $5000; Richard Fiorella, $1000; John Pro
Anthony Pizzutelli, $300; Angelo Alfano, $200; Alfred
James Comunale, $200; Clifford Carll, $150.

3. Whether the use of double hearsay in securing the wiretap order violated the petitioners' rights under the Fourth Amendment.

4. Whether § 1955 is unconstitutional because the Commerce Clause does not authorize Congress to criminally punish five or more persons who engage in an illegal gambling business without any showing that such activity affects interstate commerce.

Constitutional Provisions

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes Involved

18 U. S. C. § 1955, entitled "Prohibition of Illegal Gambling Business," provides in pertinent part:

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) 'illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

• • •"

18 U. S. C. § 2516, entitled "Authorization for Interception of Wire or Oral Communications," provides in pertinent part:

"(1) The Attorney General or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or have provided evidence of—

* * *"

18 U. S. C. § 2518, entitled "Procedure for Interception of Wire or Oral Communications," provides in pertinent part:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

* * *

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communication, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

* * *"

Statement of Facts

This case arose during the course of an FBI investigation into gambling in the City of Rochester, New York, in 1971. A confidential informer had advised an FBI agent in December of 1970 that one Alfred Rivoli was accepting wagers over a telephone at 84 Cleveland Street in the City of Rochester. That address was then placed under physical surveillance by FBI agents from December of 1970 until March 18, 1971.

On March 4, 1971 the government obtained a wiretap order authorizing the interception of conversations over one of the telephones located at 84 Cleveland Street in Rochester. The tap ran for 12 days and produced 28 reels of evidence, much of which disclosed the appellants' accepting wagers and giving out betting information. These tapes provided the bulk of the government's case at trial.

On March 18, 1971 FBI agents armed with search warrants swooped down on 84 Cleveland Street and arrested Anthony Pizzutelli and seized a quantity of gambling paraphernalia. The other petitioners were subsequently arrested.

As previously indicated, on March 8, 1972 all of the petitioners were acquitted on the substantive count of conducting an illegal gambling operation, but were found guilty of conspiring to violate §1955. Other facts relating directly to the legal issues raised by this petition are located under those specific points for the convenience of the Court.

REASONS FOR GRANTING THE WRIT

I

The wiretap order is invalid and violated the petitioners' rights under the Fourth Amendment because:

(A) It was not properly authorized;

(B) It did not particularly describe the persons whose conversations were to be intercepted; and

(C) It was based upon double hearsay.

The resolution of the Fourth Amendment question presented by this petition is bound to carry implications and give directions far beyond the facts of this case. For the court's ruling below, permitting an Assistant Attorney General to sign Will Wilson's* name to a wiretap authorization, is in direct defiance of the language of §2516 of Title 18 of the United States Code, requiring either the Attorney General or Will Wilson to approve such an application.

This critical question has dramatically divided the courts of this nation. The Fifth Circuit in *United States* v. *Robinson,* F.2d , 10 Cr. L. 2281 (5th Cir., January 12, 1972),** and the following District Courts have concluded that the procedures used here are constitutionally deficient: *United States* v. *Boone,* F. Supp. 12 Cr. L. 1034, 2190-2191 (E.D. Va., October 5, 1972); *United States* v. *Vasquez,* F. Supp. , 12 Cr. L. 2137 (C.D. Cal. September 21, 1972); *United States* v. *Whitaker,* 34

* At the time this investigation was initiated, Will Wilson was the specially designated Assistant Attorney General.

** Re-argument heard *en banc* on October 30, 1972, decision pending. *United States* v. *Robinson,* F.2d (5th Cir., Do No. 71-1058, July 21, 1972).

F. Supp. 358 (E.D. Pa. 1972); *United States* v. *Narducci*, 341 F. Supp. 1107 (E.D. Pa. 1972); *United States* v. *Casale*, 341 F. Supp. 374 (M.D. Pa. 1972); *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Md. 1972); *United States* v. *Baldassari*, 338 F. Supp. 904 (M.D. Pa. 1972); *United States* v. *Aquino*, 336 F. Supp. 737 (E.D. Mich. 1972); *United States* v. *Cihal*, 336 F. Supp. 261 (W.D. Pa. 1972); *United States* v. *King*, 335 F. Supp. 523 (S.D. Cal. 1971).

Whereas, the Second Circuit in this case and in *United States* v. *Becker*, 461 F.2d 230 (2d Cir. 1972); *United States* v. *Pisacano*, 459 F.2d 259 (2d Cir. 1972), and the Eighth Circuit in *United States* v. *Cox*, F.2d , 11 Cr. L. 2263 (8th Cir., June 5, 1972), have approved the irregular procedures used here, together with the following District Courts. *United States* v. *Askins*, F. Supp. , 12 Cr. L. 1033-1034 (D.Md., October 27, 1972); *United States* v. *Cinsiglio*, F. Supp. (D. Conn., Crim. No. H-24, April 20, 1972); *United States* v. *LaGorga*, 366 F. Supp. 190 (W.D. Pa. 1972); *United States* v. *D'Amato*, 340 F. Supp. 1020 (E.D. Pa. 1972); *United States* v. *Ianelli*, 339 F. Supp. 171 (W.D. Pa. 1972).

Many of these District Court decisions are under review by the parent Courts of Appeals.*

Our country's courts have been torn asunder by this question which must be authoritatively resolved. The confusion and despair among law enforcement agencies has become intolerable. Consequently, no case deserves review by this Court more than the one at bar.

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*The Fourth Circuit scheduled argument for September 13, 1972 in *United States* v. *Giordano*, Doc. Nos. 72-1399 and 72-1407 (appeal from *United States* v. *Focarile*, *supra*).

On August 4, 1972 the Third Circuit, on its own motion, ordered the *Cihal* case listed for reconsideration by the court, *en banc*.

Recently this Court, in discussing the perplexing problem of electronic surveillance, declared:

> "The issue before us is an important one for the people of our country and their government. It involves a delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval." (*United States* v. *United States District Court, Eastern Michigan,* U. S. , 92 S.Ct. 2125, 2128 [June 19, 1972]).

The issue here involves the crucial question of the government's power to tap telephones without following the specified authorization procedures established by Congress. Consequently, this question, just as much as the former, is entitled to this Court's careful consideration.

Section 2516 of Title 18 explicitly provides in pertinent part:

> "The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge . . . [for a wiretap order]."

Section 2518 of Title 18 provides that an application for an order authorizing the interception of telephone conversations shall identify "the officer authorizing the application."

In this case, the application for a wiretap order was made in an affidavit, dated March 3, 1971, by the United States Attorney in Buffalo which had attached to it a "Wilson letter" authorizing the application. However, the Wilson letter was a forgery since it was signed by a member of his staff.

In response to petitioners' pretrial motions to suppress the wiretap evidence as illegally secured, the government

produced an affidavit from Sol Lindenbaum, the Executive Assistant to the Attorney General, which merely showed that Will Wilson had been delegated the authority to approve such applications. The record demonstrates that Will Wilson never signed the letter bearing his name (137).* Attached to Lindenbaum's affidavit was a memorandum initialed by then Attorney General John N. Mitchell to Wilson dated March 1, 1971 stating:

> "Pursuant to the powers conferred on me by §2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing H. Kenneth Schroeder, Jr. to make the above-described application". (126)

Thus, it is undisputed that neither the Attorney General nor the officer specially designated by him, Will Wilson, authorized the instant application for a wiretap order.

Furthermore, the application for the wiretap order submitted to the District Judge misrepresented that Will Wilson had properly approved it, when in fact he had never seen the application. Instead, the order was authorized by some unknown person never disclosed by the government.** Accordingly, it is uncontroverted that this wiretap order was not properly authorized and was further defective in that it did not specify the officer who actually authorized the application.

In *United States* v. *United States District Court, Eastern Michigan, supra,* this Court emphasized that:

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* Numbers in parentheses refer to pages in the Appendix supplied to the Court of Appeals.

** In a number of other cases decided by the Second Circuit, the government, at the very least, did describe the person who actually approved the application. For instance, in *United States* v. *Becker,* 461 F.2d 230 (2d Cir. 1972), it was revealed that Sol Lindenbaum authorized the application. Here, however, it was never disclosed who actually authorized the application.

"Section 2518 sets forth the detailed and particulariz application necessary to obtain such an order as w as carefully circumscribed conditions for its use.

• • •

"The express grant of authority to conduct surve lances is found in § 2516, which authorizes the Attorn General to make application to a federal judge wh surveillance may provide evidence of certain offens

• • •

"Where the Act authorizes surveillance, the procedu to be followed is specified in § 2518." (92 S.Ct. 21 at 2129, 2130)

And more recently in *Gelbard* v. *United States*, 408 U. 41, 92 S.Ct. 2357 (June 26, 1972), this Court again e phasized the need for strict compliance with these electro surveillance sections by stating:

"Title III authorizes the interception of private w and oral communications, but only when law enfor ment officials are investigating specified serious crin and receive prior judicial approval, *an approval t may not be given except upon compliance with string conditions.* 18 U.S.C. §§ 2516, 2518(1)-(8)." (92 S. at 2360; emphasis added.)

The Court in *Gelbard* went on to quote at great len from Title III's legislative history, which demonstrated need for restricting all forms of electronic surveilla unless properly authorized.

Surely the constitutional and statutory failures eviden in this case are in direct disregard of the spirit of Court's holdings in *United States* v. *United States Dist Court, Eastern Michigan, supra,* and *Gelbard* v. *Un States, supra.*

Even the Court of Appeals for the Second Circuit reluctantly sustaining these irregular procedures bec it felt obliged to follow its disquieting decisions in *Un*

States v. *Pisacano, supra,* and *United States* v. *Becker, supra,* seemed to offer an apology for the conclusions it reached, warning prosecutors never to do this again.*

Thus the Second Circuit continues to perform open heart surgery on these wiretap orders, attempting to rescue them at the eleventh hour from this incurable and fatal defect. These unfortunate decisions have turned out to be the Second Circuit's worst miscalculations in the past decade because they so gravely undermine Fourth Amendment principles and reflect a complete lack of understanding of the judicial and congressional history of electronic eavesdropping. They are bound to sponsor gross laxity in wiretap procedures if not immediately corrected.

In direct response to the guidelines enunciated in *Berger* v. *New York,* 388 U.S. 41 (1967), and *Katz* v. *United States,* 389 U.S. 347 (1967), Congress produced legislation intended to meet the constitutional test that electronic surveillance be used only under the most precise and discriminate circumstances. See 1968 *U. S. Code Cong. & Admin. News* 2191. Clearly, the legislative history of § 2516 reflects Congress' specific concern that applications be approved by persons who are responsible to the people through congressional approval. The executive assistant is not. Consequently, there is no political check upon the executive assistant and the forces influencing his decision are therefore quite different from those acting upon the Attorney General and his nine Assistants.

---

* "Our adherence to the law of the circuit, as thus established, is not to be construed as an approval of the procedure followed by the Attorney General and his staff and we trust that henceforth all applications to the court pursuant to §§ 2516 and 2518 will be specifically authorized personally by the Attorney General or by an Assistant Attorney General specifically designated by him for the purpose." (461 F.2d at 236.)

It is clear that Congress intended to repose the auth to authorize applications for wiretap orders in "a pu responsible official subject to the political process." *U. S. Code Cong. & Admin. News* 2185.*

The government's ignoring of these mandatory elec surveillance provisions cannot be tolerated and warr grant of this petition.

There is another equally important reason for co tionally invalidating the wiretap order here. Sectio (10)(a)(ii) provides that a motion to suppress m granted if the order ". . . is insufficient on its face." can be no question that the order in this case failed t tify the person who had actually authorized the a tion. Traditionally, our courts have invalidated wa where either misleading or false information has bee plied to the issuing magistrate. *United States* v. *U* 448 F.2d 1218 (5th Cir. 1971); *Pugh* v. *Pate*, 401 F.2d Cir. 1968); *United States* v. *Roth*, 391 F.2d 507 (7t 1967); *King* v. *United States*, 282 F.2d 398 (4th Cir.

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* *The Report on Applications for Orders Authorizing or ing the Interception of Wire or Oral Communications January to December 30, 1970*, prepared by the Administrative Offic United States Courts, 1971, hereinafter called the *Report*, sho last year federal and state authorities eavesdropped on 390,681 conversations involving at least 29,550 individuals using t hidden microphones. Over 29,000 persons were listened to, 1,912 arrests were made. For each interception there was an of 44 persons listened to and, incredibly, 655 calls overheard. for every person arrested as a result of eavesdropping, al people were listened to. Clearly, the words of Mr. Justice dissenting in *United States* v. *White*, are particularly pertine

> "Electronic surveillance is the greatest leveler of human ever known." (401 U.S. 745, at 756)

According to this report, not one single application for e interception in 1970 was turned down by a state or federa It is difficult to see how probable cause can be shown in so ma and result in so few arrests.

Certainly the United States District Court Judge was entitled to know that Will Wilson did not make the determination in this case. At the very least, he had the right to know the true person who examined the government's file and authorized the application for electronic surveillance, the identity of whom is still unknown.

And finally, the petitioners should not be relegated to the *ex parte* affidavits of Washington officials, unchallengeable by cross-examination. At the very least, the petitioners should have been accorded the right to a full judicial investigation of these bizarre authorization procedures in an adversary hearing.

Such a hearing is mandated under the authority of *Alderman* v. *United States,* 394 U.S. 165 (1967), where the Supreme Court unequivocally held that an aggrieved party could not be constitutionally required to rely upon a representation of the government concerning the use of tainted evidence and that such claims would have to be investigated in an adversary forum. Our situation here is exactly the same. An adversary hearing provides a superior means of deciding factual issues where such a determination must be made on the basis of disputed facts of whether a person actually saw the application for authorization or not. In this case the affidavits supplied to the court are far more ambiguous and vague than those submitted in both *United States* v. *Becker,* 461 F.2d 230 (2d Cir. 1972), and *United States* v. *Pisacano,* 459 F.2d 259 (2d Cir. 1972). Undoubtedly a hearing would have shown that the Attorney General never actually inspected this file. Thus, an adversary hearing is properly authorized by *Alderman* v. *United States, supra.* See also *Russo and Ellsberg* v. *Byrne,* U.S. , 12 Cr. L. 4071 (November 13, 1972, Douglas, J., dissenting).

Significantly, the Solicitor General, in response t
petition in *Becker* v. *United States*, No. 72-158, filed
28, 1972, dealing with the same subject, suggested th
petition be held in abeyance pending the outcome
reargument of *United States* v. *Robinson, supra*. We
at the very least, that the same action be taken here.

II

**The failure of the wiretap order to particularly de
the type of communications sought to be monitored
identify the persons whose conversations were to be
cepted renders it invalid.**

The wiretap order in this case authorized the moni
of private conversations in the following manner:

> "Intercept wire communications of Michael Fi
> John Porcello, Clifford Carll, Anthony Pizzutelli
> ard Grock, Alfred Rivoli, *and others* . . ." (1
> phasis added.)

Thus, the order failed to adequately describe the p
whose conversations were to be seized and contains
cific description of the conversations to be monito
required by § 2518.* As an example, the order did n
vide for the interception of the conversations of F
Fiorella, but his conversations were monitored und
general authority of "and others."

---

* Section 2518 provides in pertinent part:

> "* * *
>
> (4) Each order authorizing or approving the interce
> any wire or oral communication shall specify—
>
> (a) the identity of the person, if known, whose com
> tions are to be intercepted;
>
> * * *
>
> (c) a particular description of the type of commu
> sought to be intercepted, and a statement of the p
> offense to which it relates;
>
> * * *"

Such an authorization is clearly in the nature of a general warrant, since the type of conversation which might "concern" a list of offenses is left "to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U.S. 192 (1927). The police officers here were empowered to listen to virtually every person's conversation transmitted over these telephones, without limitation.*

It is constitutionally imperative that the persons whose conversations are sought to be seized be sufficiently described. *Berger* v. *New York*, 388 U.S. 41 (1967). The particularity of description mandated by the statute was defeated here by adding to the names in the order the words "and others." This unfortunate addition converted the order to a general warrant, authorizing the interception of any unknown person's conversation.

This Court in *Berger* expressed the deepest concern over electronic surveillance, recognizing its potential for abuse. It was against this backdrop that a wiretap order almost identical to the one at bar was struck down as constitutionally deficient.

The important policy pronouncements of *Berger* embodied in § 2518 cannot be side-stepped by the anemic phrase "and others." In a word, the procedural safeguards mandated by § 2518 and constructed by this Court were left in a shambles by the unbridled eavesdropping conducted in this case which was totally indiscriminate and lacking in particularity. Because the ex-

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* Other courts which have approved this general language are *United States* v. *Cox*, 449 F.2d 679 (10th Cir. 1971); *United States* v. *King*, 335 F. Supp. 523 (S.D. Cal. 1971); *United States* v. *Perillo*, 333 F. Supp. 914 (D. Del. 1971); *United States* v. *Sklaroff*, 323 F. Supp. 296 (S.D. Fla. 1971). These cases illustrate the dangerous trend which has emerged in this crucial area of electronic surveillance.

pansive nature of this wiretap order goes far bey
previously sanctioned by this Court, and becaus
not properly authorized, this Court should grant r

III

Reliance on double hearsay.

There is yet another ground upon which the
order in the instant case should be invalidated. Th
probable cause used to secure the wiretap order w
upon double hearsay.

The probable cause upon which the wiretap or
issued was based upon information received from
dential informant who told FBI agent Hugh Higg
one of the petitioners had accepted bets over a tele
84 Cleveland Street in Rochester. Higgins then
passed this information on to another agent by the
Johnny Evans. Evans then supplied all of this inf
to the Court. Thus, it is undisputed that none of th
furnished to the Court were actually obtained b
Evans never spoke to the informer, was unable to
his reliability, and did not himself check the teleph
pany records, and only conducted one or two surv
in the case. Consequently, if it turned out that
dential informer was either non-existent or not re
that the surveillances were inaccurate, Evans wou
no sanctions of perjury.

Both the Fourth Amendment to our Constitutio
Omnibus Crime Control Law provide that a wiret
shall issue only on affidavits sworn to before a jud
lishing probable cause for the issuance of such an
tion of private telephone messages.

The constitutional requirements that facts showing probable cause be sworn to before a judge is designed to provide some protection to the victim of a secret search by subjecting the affiant to the sanctions of perjury if he misstates any facts before a judicial officer. Here this procedural safeguard was nullified and avoided by the clever device of straining the facts of probable cause through an FBI agent who had no personal knowledge of the circumstances which formed the basis of the warrant.

Although hearsay information can be the basis of issuing a search warrant, the agent who swears to the magistrate that he acquired this information is usually able to vouch for its reliability. *United States* v. *Ventresca*, 380 U.S. 102 (1965), and *Jones* v. *United States*, 357 U.S. 493 (1958). In our case, the swearing agent was unable to attest to the reliability of the information acquired by another agent from a confidential informer, since he himself did not obtain it. If this device were to receive judicial approval, there is no limit to the extent of double hearsay—or even triple hearsay—that could be employed.

Although the Second Circuit approved this use of "double hearsay," it did so with misgivings, warning prosecutors:

> "We do note, however, that the use of 'double hearsay' in cases like this is not to be encouraged. Where an informant speaks to an agent, it is that agent who should normally relay the information to the magistrate evaluating the search warrant application. Informants' tips relayed through two agents and then to the magistrate, however accurately reported, unnecessarily reduce the magistrate's ability to make an independent determination of the information's reliability." (Appendix A-7, *infra*.)

More and more lower courts are beginning to turn their heads and are ignoring these shortcuts taken by prosecutors

which make serious inroads into constitutional protections designed to serve every citizen. This dangerous trend must be halted if these constitutional safeguards are to remain meaningful.

Today everywhere we look privacy is imperiled and the only bulwark that stands between man's last vestige of seclusion and total surveillance is this nation's courts. In the face of newly perfected and frightening techniques of electronic surveillance, science has at last brought the weapons in the war on privacy to the doorstep of every man's home. Prosecutors must be made to adhere to the strict requirements of § 2518 and the Fourth Amendment or no man's home will be safe. It is now apparent that prosecutors have begun to drift away from the original moorings fixed by this Court in *Berger* and subsequently codified by Congress in § 2518. This case, more than any other, marks the extent of that drift.

The unlimited and indiscriminate surveillance conducted here offers an ominous omen of what will come if these practices are not judicially controlled. If this wiretap order is approved in exchange for evidence to secure the conviction of a few petty gamblers, we will have paid a price we simply cannot afford if the constitutional safeguards embodied in the Fourth Amendment are to remain real and secure.

Accordingly, certiorari should be granted to restore § 2518 to its true and limited meaning.

IV

Petitioners' convictions must be reversed because § 1955 was unconstitutionally applied and, furthermore, the statute is unconstitutional on its face because the Commerce Clause does not authorize Congress to criminally punish five or more persons who engage in illegal gambling business without any showing that such activity affects interstate commerce.

Petitioners unsuccessfully launched a full frontal assault against § 1955 in the courts below, charging that it was unconstitutional on its face and as applied in this case. Although each of the petitioners was acquitted of the substantive violation of § 1955, they were each convicted of conspiring to violate § 1955. Consequently, if § 1955 is unconstitutional, the petitioners' convictions for conspiring to violate that section must be vacated.

The government's proof in this case was limited to 11 days wherein the evidence demonstrated that there were only four days where the accepted wagers totaled more than $2,000 in a single day. The expert's original report of the volume of bets totaled a mere $14,915.59. Thus, this case demonstrates better than any other how our federal resources can easily be depleted in the prosecution of petty gamblers when far more serious matters deserve our government's attention.

Essentially, § 1955 provides that if five or more persons "conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business . . .," they may be imprisoned for five years and/or fined $20,000. An illegal gambling business is defined as one which either exists continuously for more than thirty days or grosses $2,000 in a single day.

Six of the eight persons named in the indictment, peti
tioners Carll, Porcello, Pizzutelli, Alfano, Rivoli, and Com
unale, were proven to be merely clerks, *i.e.*, men who worke
at other employment but who accepted bets from customer
while employed on a salaried basis in this gambling opera
tion. Thus, the central issue at the trial was whether thes
clerks, who exercised no control over the gambling business
were conducting it and consequently came within the clutch
es of § 1955 and accordingly were subject to five year
imprisonment and a $20,000 fine.

Any constitutional evaluation of this statute must b
made against the background of this Court's decisions i
United States v. *Bass*, 404 U.S. 336 (1971), and *Rewis* v
United States, 401 U.S. 808 (1971). As we shall show, thes
two decisions are dispositive of this case.

In *Rewis*, this Court was presented with a statute whic
if broadly construed, would have supported a conviction u
der federal law for the operation of a small local lottery
which persons sometimes traveled across state lines. Th
legislative history of that statute was, as here, silent c
the implication of rendering traditionally local activity
federal crime. Thus, in language applicable to this cas
this Court severely limited the reach of § 1952 of Title
and in unmistakable terms expressed its concern for th
sensitivity of federal-state relationships by emphasizin

> "In such a context, Congress would certainly recogni
> that an expansive Travel Act would alter sensiti
> federal-state relationships, could overextend limit
> federal police resources, and might well produce situ
> tions in which the geographic origin of customers,
> matter of happenstance, would transform relative
> minor state offenses into federal felonies." (401 U.
> at 812)

For instance, in our case, before a person can be convicted of felonious bookmaking in New York State, under § 225.10 of the Penal Law, he must receive in any one day more than five bets totaling more than $5,000. Accordingly, § 1955 elevates a minor state misdemeanor to a felony under federal law. Certainly, before this Court sanctions any expansion of the reach of federal police power to state gambling misdemeanors, it requires a much clearer statement of intent from Congress than is evidenced here.

Therefore, § 1955 is unconstitutional on its face and as applied here because there was no proof of a continuous operation of thirty days and the $2,000 figure represents only a state misdemeanor. In other cases where federal jurisdiction has been invoked under § 1955, both the $2,000 figure and the 30-day operation requirements have been met.

More recently, this Court in *United States* v. *Bass, supra,* held § 1202 of the Omnibus Crime Control Law to be unconstitutional as applied. The Court there, in the very preamble of its opinion, issued the following warning to state prosecutors:

> "We conclude that § 1202 is ambiguous in the critical respect. Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." (92 S.Ct. 515, at 518)

More particularly, this Court reinforcing what it said in *Rewis,* admonished prosecutors against the practice of overloading federal statutes, by stressing:

> "There is a second principle supporting today's result: unless Congress conveys its purpose clearly, it will not

> be deemed to have significantly changed the Federa
> State balance. Congress has traditionally been relu
> tant to define as a federal crime conduct readily d
> nounced as criminal by the States . . . .
>
> • • •
>
> "In the instant case, the broad construction urged b
> the Government renders traditionally local crimin
> conduct a matter for federal enforcement and woul
> also involve a substantial extension of federal poli
> resources." (92 S.Ct. 515, at 523, 524)

Surely Congress never meant the already over-extende resources of the federal government to be misspent in t prosecution of petty gamblers, and particularly salari clerks, who merely write down a few bets in a bookmaki business. Such a misconstruction would fling open t sluice gates and flood our federal courts with literal thousands of small bookmaking operations previously co trolled by the states.*

Significantly, the Association of the Bar of the City New York, displaying great foresight, opposed the ena ment of § 1955 on these very grounds.**

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* Significantly, in 1970, 8,366 persons were arrested for the offe of misdemeanor bookmaking in New York State alone. Director Records and Statistics, New York State Department of Correctio Services.

** "Similarly, proposed Section 1955, which makes gambling ille under the laws of any state or political subdivision thereof a fede crime, goes far beyond the targets of the Bill, which are said to be 'large-scale business enterprise of gambling.' Senate Report 71, 'illicit gambling business of major proportions,' Senate Report In our view, no need has been demonstrated for so dramatic a dep ture from its traditional federal principles, which shun unnecess interference with the local administration of justice. It is one th for the federal government to intervene to end local corruption, objective of proposed Section 1511, since local corruption so be hinders local law enforcement activities; but it is quite another th to enforce a state's substantive criminal law, as Section 1955 would If the anti-corruption Section were adopted in an improved form

(Footnote continued on following pag

When Will Wilson, then an Assistant Attorney General of the United States, testified before the legislative committee considering this bill, he stated:

> "The amendments would not embroil federal authority in the enforcement of local gambling laws in minor cases, *such as a prosecution of individual runners.* Only large-scale criminal operations would be covered by the new provisions. Individual bettors would, of course, not be covered since only those *conducting* an illegal gambling business would be in violation of the amendments." (*Hearings before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, 91st Congress, Second Session, on S. 30 and Related Proposals Relating to the Control of Organized Crime in the United States,* Dated May 20, 21, 27; June 10, 11, 17; July 23 and August 5, 1970, page 401; emphasis added.)

Congress' discarding of the mere "participation" language and the adoption of the term "conducts, finances, manages, supervises," etc., lends force to our claims here that Congress intended *more* than mere participation as urged by the government. In other words, this dramatic change in the statute clearly indicates an intention on the part of Congress to bring within the reach of § 1955 only those persons who actually exercised some control over the bookmaking business. Surely a clerk, as defined by the

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(Footnote continued from preceding page)
achieved its purpose, local law enforcement should become more vital and there would be little need for the federal government to intervene.

* * *

"However, the consequences are more serious under this Section, since a five-year jail sentence and a $20,000 fine can be imposed on anyone who 'participates in an illegal gambling business.' As noted above, this penalty could be asserted against small-time bookmakers and could possibly apply to their customers as well." (The Association of the Bar of the City of New York, Committee on Federal Legislation Report on the Proposed Organized Crime Control Act of 1969 (S. 30), May 12, 1970, pp. 37-38.)

government's own expert, influences no such control ov
bookmaking operation.*

It is apparent that the *Rewis* and *Bass* cases are ex
tionally relevant here. Both cases involved a questio
statutory construction where the government's interp
tion would have greatly expanded federal criminal juri
tion under the Commerce Clause to include conduct
previously contemplated by that provision. Althoug
both cases it could be argued that the government's inte
tation was not unreasonable, this Court denounced
government's translation on the ground that, "Our p
in constitutional cases is reinforced by the long trad
and sound reasons which admonish against enlargeme
criminal statutes by interpretation." *United States* v.
mark, 346 U. S. 441, at 449 (1953). "And even if
lack of support [for a broader reading] were less appa
ambiguity concerning the ambit of criminal statutes sh
be resolved in favor of lenity." *Rewis* v. *United St*
401 U. S. at 812.

Perez v. *United States,* 402 U.S. 146 (1971), is inappli
to this case because it involved a "class of activiti
loansharking—which Congress found was "carried on
substantial extent in interstate and foreign comme
(402 U. S. at 147, n. 1.) No such finding was made he
the case of local bookmaking operations. The *Perez*
sion was closely tailored to extortionate credit transac
which were found to be ancillary to the larger cla
interstate loansharking activities which had been lef
policed by either the federal or state government.

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* Section 1955 "is intended to reach only those persons wh
systematically upon our citizens and whose *syndicated* operatio
so continuous and so substantial as to be of *national concern,* and
corrupt state and local officials who make it possible for th
function." (1970 *U.S. Code Cong. & Admin. News* 4029
phasis added.)

However, in our case there is extensive federal legislation covering all forms of interstate gambling. Sections 1084 and 1952 of Title 18 have been effectively used in the war on organized gambling which has overrun state borders. Consequently, our case falls well within the decisional limits of *Bass* and *Rewis* and lies well outside the reach of *Perez.**

Another significant feature of this case which must not escape this Court's attention involves the inherent ambiguity in § 1955 and inadequate notice to the public as to what conduct must be avoided. This Court was careful to point out in *Bass* that given any ambiguity in a criminal statute, its construction must, of constitutional necessity, involve ". . . the narrower reading . . . in favor of lenity." The reasons for invoking this well-settled principle are that a fair warning should be given to the public in language that the common man will understand so that disobedience can be avoided. Secondly, because of the seriousness of criminal sanctions, "legislators and not courts should define criminal activity." (92 S. Ct. 515, at 523.) This Court therefore concluded, ". . . where there is ambiguity in a criminal statute, doubts must be resolved in favor of the defendant." *(Ibid.)*

Since criminal punishment is one of the most awesome powers exercised by our government, it has been traditionally confined within the easily identifiable borders of criminal statutes.

Here, the ambiguity imposed upon § 1955 by the government is self-evident. While the rule of lenity serves only as

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* The dangerous trend in decisions upho'ding this type of legislation is epitomized by the Second Circuit Court of Appeals decision in *United States* v. *Becker,* 461 F.2d 230 (2d Cir. 1972); the Fifth Circuit's decision in *United States* v. *Harris,* 460 F.2d 1041 (5th Cir. 1972); and the Eighth Circuit's decision in *Schneider* v. *United States,* 459 F.2d 540 (8th Cir. 1972), all approving § 1955.

a means of resolving an ambiguity, not of begetti
ambiguity in a penal statute to the degree manifested
section has been consistently deemed by the Court
quire a construction in the defendant's favor. The
cases supporting this proposition is too long to ca
sequently, those cited here are illustrative only
Federal Trade Commission v. *Mandel Bros.*, 359 U.
(1959); *Heflin* v. *United States*, 358 U. S. 415
Ladner v. *United States*, 358 U. S. 169 (1958); *P*
United States, 353 U. S. 322 (1957); *Bell* v. *United*
349 U. S. 81 (1955); and *United States* v. *Universa*
Credit Corporation, 344 U. S. 218 (1952).

Surely in the case at bar a fair reading of the
imposing criminal liability on a person who "c
finances, manages, supervises, directs, or owns all
of an illegal gambling business," would not put
clerk on notice that he comes within the tentacles
criminal statute. The government's distorted int
tion of the word "conducts" enlarges it far bey
average man's common understanding of that term
a construction has vast implications, for it drags wi
undertow of this section thousands of police co
demeanors that should not be allowed to clog the b
calendars of federal district courts whose personn
been pushed to the edge of exhaustion by the high
serious federal crimes. And to impose felonious
responsibility upon mere clerks who accept a ha
bets periodically without adequately notifying th
they come within the scope of this statute is shame

It only remains to be said that today the tide of t
flowing against federal intervention into province
tionally governed by the states. *United States*
supra; *Rewis* v. *United States*, *supra*; *Byrne* v. *K*

401 U. S. 216 (1971); *Dyson* v. *Stein*, 401 U. S. 200 (1971); *Perez* v. *Ledesma*, 401 U. S. 82 (1971); and *Younger* v. *Harris*, 401 U. S. 37 (1971). Each day the longer promises of these significant decisions are becoming clearer.

CONCLUSION

For all these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Court of Appeals Opinion
October 13, 1972

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 131, 132—September Term, 1972.

(Argued September 20, 1972 Decided October 13, 1972.)
Docket Nos. 72-1459, 72-1460

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL LEO FIORELLA, A. RICHARD FIORELLA, CLIFFORD CARLL, JOHN PORCELLO, ANTHONY PIZZUTELLI, ANGELO ALFANO, ALFRED RIVOLI, JAMES COMUNALE,

Appellants.

Before: Smith, Kaufman and Mansfield, Circuit Judges.

Appeal from conviction of conspiracy to violate 18 U.S.C. § 1955, on trial to the jury in the Western District of New York, Harold P. Burke, Judge.

Affirmed.

Herald Price Fahringer, Buffalo, N. Y. (Lawrence A. Schulz, Buffalo, N. Y., of counsel), for Appellant Michael Leo Fiorella.

Norman A. Palmiere, Rochester, N. Y., for App
Richard Fiorella, Clifford Carll, John Porcello,
Pizzutelli, Angelo Alfano, Alfred Rivoli and Jan
nale.

Dennis P. O'Keefe, U. S. Dept. of Justice, W
D. C. (John T. Elfvin, U. S. Attorney for the We
trict of New York, of counsel), for Appellee.

SMITH, Circuit Judge:

Michael Leo Fiorella, A. Richard Fiorella, Clif
John Porcello, Anthony Pizzutelli, Angelo Alfa
Rivoli, and James Comunale were convicted af
day jury trial in the Western District of New Yo
J. [*sic*] Burke, *Judge*, of conspiracy to violate
§ 1955, which makes it a federal crime to condu
types of gambling businesses.[1] All were acquit
substantive charge of violating § 1955. They ap
the conspiracy conviction on grounds of insuf
evidence, inconsistency of verdict, illegality o
and prejudicial summation. We find no error
the convictions.

This case arose out of an FBI investigation o
in Rochester. Responding to tips by two confi
formants, the FBI conducted physical surveill

[1] The statute outlaws a gambling business which:

"(i) is a violation of the law of a State or politica
in which it is conducted;

(ii) involves five or more persons who conduct, f
age, supervise, direct, or own all or part of su
and

(iii) has been or remains in substantially continuo
for a period in excess of thirty days or has a g
of $2,000 in any single day."

18 U.S.C. § 1955(b)(1).

Cleveland Street in Rochester, the suspected gambling headquarters. Relying on the fruits of that surveillance and on the two tips, the government on March 4, 1971 obtained an order, pursuant to 18 U.S.C. § 2518, from Judge Burke authorizing a wiretap on a phone at the suspected headquarters. That tap ran for twelve days and produced twenty-eight reels of evidence, much of which disclosed the appellants accepting wagers and giving out betting information. These tapes provided the bulk of the government's case at trial.

Appellants' first contention is that their acquittal on the substantive charge is inconsistent with the conspiracy conviction, and thus compels reversal of the latter. That claim is obviously without merit. For one thing, appellants argued quite strenuously at trial that, whatever the evidence established, it did not show that the gambling business took in over $2000 daily, so that 18 U.S.C. § 1955 was not violated. A jury accepting that argument but finding, as it well could here, that an illegal gambling business was being conducted by these defendants, would be justified in acquitting on the substantive charge but convicting for conspiracy.[2] Moreover, even assuming *arguendo* that the

[2] Appellants' claims that there is insufficent evidence to support a conspiracy conviction are unfounded. As to all defendants but Clifford Carll and Michael Fiorella, the evidence is overwhelming. As to those two, the case is less ample, but sufficient. While Carll personally participates in only one intercepted telephone call, that instance shows him placing a bet for someone else. On several other occasions other speakers clearly link him to the gambling business; physical surveillance placing him frequently at 84 Cleveland Street and the seizure of a betting slip in his pocket upon arrest further support his conviction. As to Michael Fiorella, he is found speaking on at least three of the telephone calls, and was identified as a gambling entrepreneur by a number of customers who testified at trial. *Cf. United States* v. *Pardo-Bolland*, 348 F.2d 316, 325 (2d Cir.), *cert. denied*, 382 U.S. 944 and 382 U.S. 946 (1965) (once conspiracy is proved, only slight evidence needed to connect each conspirator with it).

acquittal on the substantive count is at odds with the conspiracy verdict, inconsistency has long been held to be one of the jury's prerogatives. *Dunn* v. *United States*, 284 U.S. 390, 393 (1931); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943); *United States* v. *Collins*, 272 F.2d 650, 653 (2d Cir. 1959).

Appellants next mount a broad attack against the wiretap. First, they contend that the wiretap order was improperly authorized. The application for a wiretap order was made in an affidavit dated March 3, 1971, by the United States Attorney for the Western District of New York. As Exhibit A to that application, the government attached a letter from the Department of Justice, authorizing the application to a federal judge for a wiretap, and reciting that it has been determined that probable cause exists in this case. This communication was apparently another of the now-familiar "Will Wilson letters," purportedly signed by the then-Assistant Attorney General, but in reality signed by members of his staff.[3]

Appellants claim that this authorization did not comply with 18 U.S.C. § 2516, which requires the Attorney General "or any Assistant Attorney General specially designated by the Attorney General," to authorize application for wiretap orders. In response to pretrial motions based on that contention, the government produced an affidavit from Sol Lindenbaum, the executive assistant to the Attorney General, which asserted that the Attorney General

[3] While the government never admitted that the letters were not signed by Wilson, Judge Burke assumed that in deciding the motion to suppress. Since the government chose to answer the defendants' allegations by showing that Attorney General John N. Mitchell authorized the application, there seems to be at least a tacit confession that questions over the authenticity of Wilson's signature were correct.

had personally approved a request for authorization to make the wiretap application in this case. Attached to the affidavit was a memorandum from Attorney General John N. Mitchell to Wilson, dated March 1, 1971, stating:

> "Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing H. Kenneth Schroeder, Jr. to make the above-described application."

That memorandum contains what Lindenbaum identifies as the signed initials of Attorney General Mitchell.

The authorization here is thus precisely the same as those upheld by this court in *United States* v. *Pisacano*, 459 F.2d 259 (2d Cir. 1972), and *United States* v. *Becker*, 461 F.2d 230 (1972). In light of those decisions, appellants' contention of improper authorization must fail.[4] We do note, as we did in *Becker, supra*, 461 F.2d at 236, that our decision is not to be construed as approval of the Justice Department's procedures, and that we hope future authorizations will adhere more strictly to the letter of §§ 2516 and 2518.

Appellants next contend that since the wiretap order in this case authorized the interception of "communications of Michael Fiorella, John Porcello, Clifford Carll, Anthony Pizzutelli, Richard Grock, Alfred Rivoli, and *others yet unknown*," (emphasis added) it constitutes a general warrant. The statute, 18 U.S.C. § 2518(4)(a), however, only requires that the order specify "the identity of the person, if known, whose communications are to be inter-

[4] *Becker* also forecloses appellants' arguments that Congress acted outside the bounds of the Commerce Clause in enacting § 1955. 461 F.2d at 233-34.

cepted." That requirement has been upheld a number of times against precisely the attack mounted here. *See, e.g., United States* v. *King*, 335 F. Supp. 523, 538-40 (S.D. Cal. 1971); *United States* v. *Perillo*, 333 F. Supp. 914, 921 (D. Del. 1971); *United States* v. *Sklaroff*, 323 F. Supp. 296, 324-25 (S.D. Fla. 1971). *Cf., United States* v. *Cox*, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972). We agree. The Fourth Amendment requires a warrant to describe only "the place to be searched, and the persons or things to be seized," not the persons from whom things will be seized. The inclusion of the "others yet unknown" phrase did not invalidate the tap here.

Appellants' final attack on the wiretap is that it is unsupported by sufficient probable cause. The affidavit supporting the wiretap application in this case was made by Johnny L. Evans, an FBI special agent. In it, he recites the information supplied by the two confidential informants, who he says have both provided information that has in the past proved reliable, and in the case of the first informant, led to two convictions. Evans, however, did not personally receive the information from the informants. Rather, each informant conversed with a separate FBI agent, and these two agents passed the information on to Evans. Appellants contend that such use of "double hearsay" cannot supply probable cause.

However, the mere fact that an affidavit contains "double hearsay" does not automatically make it unsufficient to supply probable cause. *United States* v. *Smith*, 462 F.2d 45 (8th Cir. 1972); *United States* v. *Becker*, 334 F. Supp. 54 549-50 (S.D. N.Y. 1971), *aff'd*, 461 F.2d 230 (2d Cir. 1972) *United States* v. *Carney*, 328 F. Supp. 948 (D. Del. 1971

United States ex rel. Crawley v. *Rundle*, 312 F. Supp. 15 (E.D. Pa. 1969). Rather, the question is whether the information given by the informant, taken in the light of the totality of circumstances, can reasonably be said to be reliable. *United States* v. *Smith, supra*, 462 F.2d at 460; *United States* v. *Becker, supra*, 334 F. Supp. at 550 and n. 14. Here the underlying circumstances give substantial assurances as to the reliability of the information. Not only were the informants ones whose past reliability had been demonstrated and whose opportunity to obtain the information was clearly set forth, but there was also at least some independent corroboration of the tips. The physical surveillance revealed a number of the defendants in the area of the suspected gambling headquarters, and the informants correctly identified the telephone number at 84 Cleveland Street, significant in view of the fact that the telephone was apparently registered to a fictitious name. Given all these circumstances, and the fact that the middle man in the hearsay chain was a named FBI agent, not another informant,[5] the affidavit provides probable cause for the wiretap order.

We do note, however, that the use of "double hearsay" in cases like this is not to be encouraged. Where an informant speaks to an agent, it is that agent who should normally relay the information to the magistrate evaluating the search warrant application. Informants' tips relayed through two agents and then to the magistrate, however

[5] *Compare United States* v. *Smith, supra*, where the affidavit in question recited that a reliable informant had been told by a second individual that Smith was involved in narcotics selling. Despite the fact that the "double hearsay" there involved an anonymous second party in addition to the confidential informant, the Eighth Circuit found probable cause under the totality of circumstances.

accurately reported, unnecessarily reduce the magistrate's ability to make an independent determination of the information's reliability.

Appellants' last contention is that several remarks in the government's summation constituted prejudicial error. Apparently in response to defendants' contentions that they were mere "clerks" in a penny-ante operation, the prosecutor told the jury that the government had not indicted employees, but rather "the managers" and "board of directors" of the gambling operation. He went on to note that this particular operation took in $65,000 in the twelve days of the tap over only one telephone, and if that figure were multiplied by the three telephones at 84 Cleveland Street and extrapolated over one year's time, it would total $5,475,000.

Even assuming *arguendo* that these statements constituted error, any possible prejudice was cured by Judge Burke. In response to an objection about the mathematical calculations, Judge Burke interrupted the summation to caution the jury that this was only argument, and that no one in the evidence had said anything about such a figure. In his charge, the judge described this calculation as "pure speculation" and not based on the evidence in the case. Similarly, his charge told the jury that there was no evidence of any board of directors, and that they were to "discount" the statement to that effect as argument, and not an established fact.

Appellants' contentions are without merit. The convictions are affirmed.